Supreme Court, U.S.
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No. 07-160

In The
Supreme Court of the United States

JAMES LALIBERTE, et al., for themselves individually, and as representatives of all similarly situated persons,

Petitioners,

vs.

PACIFIC MERCANTILE BANK,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California, Fourth Appellate District, Division Three

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May borrowers seek, on a class-wide basis, either rescission of class members' loans or a declaration of the right to rescind their loans when a defendant lender has uniformly violated class members' rights provided by the Truth-In-Lending Act ("TILA"), 15 U.S.C. section 1601, *et seq.*?

PARTIES TO THE PROCEEDING

Petitioners are Plaintiffs James LaLiberte, Dennis O'Connor and Jann O'Connor (hereinafter "Plaintiffs" or "LaLiberte and the O'Connors").

Respondent is Pacific Mercantile Bank (sometimes referred to herein as "Defendant BANK").

CORPORATE DISCLOSURE STATEMENT

Pacific Mercantile Bank is a wholly owned subsidiary of the bank holding company, Pacific Mercantile Bancorp. Pacific Mercantile Bancorp is publicly traded under the symbol PMBC.

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Petitioners respectfully petitions for a writ of certiorari to review the Opinion of the California Court Of Appeal, Fourth Appellate District, Division Three, discretionary review of which was denied by the California Supreme Court. This petition raises a singular question which has generated substantial discord amongst the various federal and state courts to examine the issue.

OPINIONS BELOW

The Opinion of the California Court Of Appeal, Fourth Appellate District, Division Three, (App. A) is reported at *Laliberte v. Pacific Mercantile Bank*, 147 Cal.App.4th 1, 53 Cal.Rptr.3d 745 (January 25, 2007). The trial court opinion sustaining Respondent's Motion to Strike was not reported.

STATEMENT OF JURISDICTION

The order denying discretionary review by the California Supreme Court was entered on May 9, 2007. *See,* Appendix B, at 20–a.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. *See also, Howell v. Mississippi*, 543 U.S. 440, 442-443, 125 S.Ct. 856 (2005).

STATUTORY PROVISIONS INVOLVED

This petition turns upon two sections of the Truth-In-Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*, namely, sections 1635 and 1640. The full text of sections 1635 and 1640 are included herewith in the

Appendix, but significant portions of each section are included below for the Court's convenience.

Section 1635 states, subdivisions (h) and (i) state as follows:

> (h) Limitation on rescission
>
> An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Board, or a comparable written notice of the rights of the obligor, that was properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.
>
> (i) Rescission rights in foreclosure
>
> (1) In general
>
> Notwithstanding section 1649 of this title, and subject to the time period provided in subsection (f) of this section, in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind

the transaction equivalent to other rescission rights provided by this section, if--

(A) a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

(B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Board or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.

(2) Tolerance for disclosures

Notwithstanding section 1605(f) of this title, and subject to the time period provided in subsection (f) of this section, for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $35 or is

greater than the amount required to be disclosed under this subchapter.

(3) Right of recoupment under State law

Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.

(4) Applicability

This subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995.

Section 1640, subdivision (a) and (a)(2)(B) state as follows:

(a) Individual or class action for damages; amount of award; factors determining amount of award

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of —

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this

> subparagraph in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor;

STATEMENT OF THE CASE

A. The Gravamen Of The Underlying Action.

TILA sets forth the requirements with which a lender must comply when consummating a loan transaction. Joint Appendix filed with the California Court of Appeal ["JNT. APP."], at 288.[1] The loans which are the subject of this lawsuit are closed-end loans secured by either real property and/or closed-end refinance loans secured by a person's principal dwelling and were obtained primarily for personal, family or household purposes. JNT. APP., at 288-289. As with every such loan, TILA's Disclosure Statement must include the disclosures articulated in 15 U.S.C. § 1638(a), and must be provided to the borrower. JNT. APP., at 289.

In April 2002, LaLiberte applied for a closed-end loan, which also constituted a closed-end refinance loan, through Defendant BANK, to

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[1] Pursuant to Rules of the Supreme Court, Rule 12.7, Petitioners herein cite to the record that is presently on file with the Clerk of the California Court of Appeal.

refinance his principal dwelling. JNT. APP., at 290. Federal law requires that the borrower be provided with a TILA Disclosure Statement, which discloses the Finance Charge associated with the loan under TILA and Regulation Z. JNT. APP., at 290. The Disclosure Statement with respect to LaLiberte's loan did not include the Closing Fee in the amount of $450.00 as part of the Finance Charge. JNT. APP., at 290.

In April 2002, the O'Connors applied for two closed-end loans in the approximate principal amounts of $300,700.00 and $75,000.00, respectively, which also constituted closed-end refinance loans through DEFENDANT PMB to refinance their principal dwelling. JNT. APP., at 291. The Disclosure Statement with respect to the O'Connor's loans did not include the Closing Fees in the amount of $450.00 as part of the Finance Charge for each loan. JNT. APP., at 291.

On June 20, 2002, LaLiberte informed Defendant BANK in writing that he was invoking his right to rescind. JNT. APP., at 295. Defendant BANK refused his request. JNT. APP., at 295.

On or about April 18, 2003, the O'Connor's informed Defendant BANK in writing that they were invoking their right to rescind. JNT. APP., at 296. Defendant BANK refused their request. JNT. APP., at 296.

LaLiberte and the O'Connors allege that Defendant BANK failed to include, as part of the

Finance Charge, in every case, the Closing Fee on all closed-end loans secured by real property and/or closed-end refinance loans secured by the principal dwelling of the borrower, made during the class period. JNT. APP., at 290.

B. Proceedings Below

Plaintiffs filed suit in the Orange County Superior Court against Defendant PACIFIC MERCANTILE BANK on May 22, 2003. JNT. APP., at 1. On November 21, 2003, Plaintiffs filed a First Amended Complaint, adding class allegations. JNT. APP., at 15-20. On March 24, 2004, Plaintiffs filed a Second Amended Complaint ("SAC"). JNT. APP., at 15-20.

Defendant BANK demurred to Plaintiffs' SAC. JNT. APP., at 154. Defendant BANK also filed a Motion to Strike portions of Plaintiffs' SAC. JNT. APP., at 179. The Trial Court sustained the Demurrer with leave to amend, and granted the Motion to Strike. JNT. APP., at 278. Regarding the Motion to Strike, the Trial Court ruled that LaLiberte and the O'Connors were denied leave to amend to state a class claim for rescission or a declaration of an entitlement to rescind as to the class. JNT. APP., at 281.

On May 6, 2005, LaLiberte and the O'Connors filed a Third Amended Complaint ("TAC"). JNT. APP., at 283. The litigation that followed concerned

the suitability of Petitioners to serve as class representatives. That decision was reversed by the California Court of Appeal, Fourth Appellate District, Division Three, and is not the subject of this Petition.

On October 20, 2005, LaLiberte and the O'Connors filed their Notice of Appeal. JNT. APP., at 388. The Trial Court's decision to strike class allegations was subject to immediate review, and the Court of Appeal exercised its discretion to review the collateral ruling that Plaintiffs could not state either a classwide claim of rescission or seek a classwide declaration of the right to rescind.

After the Court of Appeal rendered its decision on January 25, 2007, Plaintiffs filed a timely Request for Rehearing, identifying errors in the Fourth District's Opinion. That Request was denied. The California Supreme Court denied Petitioner's Petition for Review on May 9, 2007.

ARGUMENT

I.
FEDERAL COURTS ARE IRRECONCILABLY DIVIDED AS TO WHETHER RESCISSION IS UNAVAILABLE ON A CLASS-WIDE BASIS, AND THESE CONFLICTING DECISIONS SHOULD BE REVIEWED BY THIS COURT

Federal courts have considered the issue of whether a declaration of the right to rescind is available on a class-wide basis, but they are almost evenly divided as to whether that remedy is available as a class-wide remedy in class actions. This Petition raises the straightforward but significant question of whether the remedy of rescission is available, in any form, in class actions.

Along with the *Laliberte* Opinion, cases denying either the remedy of rescission on a class-wide basis or a declaration of the right to rescind on a class-wide basis include:

> *McKenna v. First Horizon Home Loan Corp.*, 475 F.3d 418 (1st Cir. 2007), ("*McKenna First Circuit*"), reversing *McKenna v. First Horizon Home Loan Corp.*, 2005 U.S. Dist. LEXIS 41491 (D.Mass., Nov. 10, 2005, Civ. A. No. 04-10370-RCL) (*McKenna*);
>
> *James v. Home Const. Co. of Mobile, Inc.*, 621 F.2d 727, 730 (5th Cir. 1980);

Gibbons v. Internbank Funding Group, 208 F.R.D. 278, 285-286 (N.D.Cal. 2002) (Gibbons);

Murry v. America's Mortgage Banc, 2005 U.S. Dist. LEXIS 11751, 2005 WL 1323364 *10-11 (N.D.Ill. May 5, 2005, No. 03 C 5811);

Jefferson v. Security Pacific Financial Services, Inc., 161 F.R.D. 63, 68-69 (N.D.Ill. 1995) (Jefferson); and,

Mayo v. Sears, Roebuck & Co. 148 F.R.D. 576, 583 (S.D.Ohio 1993).

However, cases allowing TILA rescission claims to be pursued, in some fashion, as a class action include:

In re Ameriquest Mortg. Co. Mortg. Lending Practices Litigation, 2007 WL 1202544, *3 (N.D.Ill. 2007);

Andrews v. Chevy Chase Bank, FSB, 240 F.R.D. 612 (E.D.Wis. 2007), appeal docketed, No. 07-1326 (7th Cir. Feb. 14, 2007)[2];

Rodrigues v. Members Mortg. Co., Inc., 226 F.R.D. 147, 153 (D.Mass. 2005);

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[2] *Andrews* is scheduled for oral argument before the Seventh Circuit on September 26, 2007.

Latham v. Residential Loan Ctrs. of America, Inc., 2004 U.S. Dist. LEXIS 7993, 2004 WL 1093315 (N.D.Ill., May 6, 2004, No. 03 C 7094);

McIntosh v. Irwin Union Bank & Trust Co., 215 F.R.D. 26, 33 (D.Mass. 2003); and,

Williams v. Empire Funding Corp., 183 F.R.D. 428, 435-36 (E.D.Pa. 1998).

California and some federal courts now hold that borrowers are not entitled to seek, on a class-wide basis, a declaration that all affected class members are entitled to rescind their loans as a result of a defendant's TILA violations. This interpretation places California squarely on the wrong side of a split amongst courts across the country, denies consumers the full measure of protections available to them as borrowers, and interferes with the primary purposes of the class action device (efficiency and deterrence).

This split of authority on the interpretation of an important federal law creates confusion as to the extent to which TILA's provisions may be enforced through class actions. This split of interpretation on a matter of widespread concern weighs in favor of review by this Court. *See,* Rules of the Supreme Court, rule 10. Considering the magnitude of the United State's lending industry and the impact this split has on borrower rights under TILA, this Court should grant the Petition to restore those tools necessary to stop anti-consumer lending practices.

A. The *Laliberte* Opinion And Some Federal Courts Incorrectly Construe The Truth-In-Lending Act ("TILA"), 15 U.S.C. Section 1601, *et seq.*, By Inferring Congressional Intent From *Inaction*, When They Should Have Applied The Canons Of Statutory Construction Known As The Doctrine Of Legislative Acquiescence.

The *Laliberte* Opinion, and the other decisions concluding that rescission (or the separate remedy of a declaration of the right to rescind) is not available on a class-wide basis, do so after inferring congressional intent from *inaction*, rather than affirmative legislation. *See*, *Laliberte*, *supra*, 147 Cal.App.4th at p. 11; *see also*, *McKenna First Circuit*, 475 F.3d 418; *James*, 621 F.2d at 730.

However, conclusions regarding congressional intent inferred from *inaction* constitute a misapplication of the rules of statutory construction. Sagely criticizing the practice of imputing legislative intent from *inaction*, Mr. Justice Rutledge, in his concurring opinion, said, "More often than not the only safe assumption to make from Congress' inaction is simply that Congress does not intend to act at all." *Cleveland v. U.S.*, 329 U.S. 14, 23, 67 S.Ct. 13 (1946); *see also*, *People v. Daniels*, 71 Cal.2d 1119, 1128, 459 P.2d 225, 80 Cal.Rptr. 897 (1969), quoting *Cleveland*. Elaborating on this criticism, Justice Rutledge observed:

> Legislative intent derived from nonaction or 'silence' lacks all the supporting evidences of legislation enacted pursuant to prescribed procedures, including reduction of bills to writing, committee reports, debates, and reduction to final written form, as well as voting records and executive approval. Necessarily also the intent must be derived by a form of negative inference, a process lending itself to much guesswork.

Cleveland, supra, 329 U.S. at 23, fn. 5. More recently, this Court succinctly stated, "Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction . . . ." *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 187, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994); *see also, U.S. v. Craft,* 535 U.S. 274, 287, 122 S.Ct. 1414, 1425 (2002), quoting *Central Bank of Denver.*

That, in 1974, Congress amended 15 U.S.C. § 1640 to set a class action damage cap but made no mention, affirmative or negative, of class actions when it subsequently amended 15 U.S.C. § 1635, governing rescission claims, provides no basis for imputing a congressional intent that rescission claims are not justiciable on a class-wide basis. In an incomplete analysis, the First Circuit's recent *McKenna* decision attempts to buttress its improper attempt to intuit congressional intent by providing a misleadingly incomplete analysis of the history of

TILA's amendments:

> In *Rodash v. AIB Mortg. Co.*, 16 F.3d 1142 (11th Cir. 1994), the Eleventh Circuit held that a creditor's TILA violation justified rescission of a mortgage loan. *See id.* at 1147. Responding to that decision, Congress enacted a moratorium on class actions for what it characterized as relatively minor violations (including the selection of an incorrect form for disclosure of rescission rights-the precise type of violation at issue here). *See* Truth in Lending Class Action Relief Act of 1995, Pub.L. No. 104-12, § 2, 109 Stat. 161, 161-62. Congress proceeded to amend the TILA to provide higher tolerance levels for what it viewed as honest mistakes in carrying out disclosure obligations. *See* Truth in Lending Act Amendments of 1995, Pub.L. No. 104-29, § 3, 109 Stat. 271, 272-73.

McKenna First Circuit, 475 F.3d at 424. What the *McKenna First Circuit* decision does not thoroughly address is that, after the 5 month moratorium on certain rescission class actions instigated by *Rodash v. AIB Mortg. Co.*, 16 F.3d 1142 (11th Cir. 1994) and other class actions, the Congress amended 15 U.S.C. § 1635 to add subsection (h) (limiting rescission claims based upon certain errors in the form of written notice or rights) and (i) (governing rescission rights in foreclosure). Conspicuously absent is any blanket restriction on class actions seeking rescission (or a declaration of the right to rescind).

The fact that Congress did not prohibit rescission class actions after taking the extraordinary step of imposing a limited moratorium on such claims is significant, and certainly more so that the mere fact that 15 U.S.C. § 1640 includes a class action damage cap. Nevertheless, without sound support, the *McKenna First Circuit* Court dismissively discounts the fact that when the Congress amended TILA in the fall of 1995, after imposing a moratorium on specific types of class action rescission claims, it did not choose to uniformly prohibit class-wide rescission claims.

Instead, this Court should hear this matter to properly construe the fact of congressional inaction *after* judicial construction of TILA. "It is a principle of statutory construction that a legislature is presumed to be aware of the judicial interpretation of words dealing with the same or analogous topics." *Estate of Sax*, 214 Cal.App.3d 1300, 1304, 263 Cal.Rptr. 190 (4th Dist. 1989). Thus, the only valid presumption, in the face of congressional *inaction*, is that the Congress intended to permit rescission claims on a class-wide basis:

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change . . . .

Lindahl v. Office of Personnel Management, 470 U.S. 768, 783, 105 S.Ct. 1620, 1629 (1985); and see discussion in *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 629 n. 7, 107

S.Ct. 1442, 1450 (1987) (explaining why the prominence of a decision may add weight to presumption that legislative inaction suggests an intent not to act). In light of the *Rodash* decision, and the subsequent moratorium, it is established that Congress was explicitly aware of the issues raised by use of the rescission remedy in class actions. If intent is to be ascribed to *inaction*, then one must necessarily ascribe congressional intent to the *inaction* when it amended TILA in 1995, after an unprecedented moratorium (imposed by emergency legislation) on certain types of rescission claims. The converse results in a rift in the logic supporting the Opinion.

Compare the conclusion reached by the *McKenna First Circuit* Court with the conclusions reached by another Court, applying the correct presumptions to the construction of TILA remedies:

> First, " 'there is nothing in the language of TILA which precludes the use of the class action mechanisms provided by Rule 23 to obtain a judicial declaration whether an infirmity in the documents, common to all members of the class, entitles each member of the class individually to seek rescission." ' *Rodrigues v. Members Mortgage Co., Inc.*, 226 F.R.D. 147, 153 (D.Mass.2005) (quoting *Williams v. Empire Funding Corp.*, 183 F.R.D. 428, 436 (E.D.Pa.1998)). I do not find it significant that Congress referred to class actions when in 1974 it amended §

> 1640 to set a damages cap but made no comparable reference when it subsequently amended § 1635, which governs rescission claims. It is just as likely that Congress did not intend to limit rescission claims in any way. *McKenna,* 429 F.Supp.2d at 291.
>
> Second, assuming a TILA plaintiff can satisfy the requirements of Fed.R.Civ.P. 23, public policy strongly favors allowing class actions in cases like the present one. Class actions serve the purpose of providing compensation in cases involving public wrongs and widespread injuries. There is no reason why a plaintiff who alleges that a defendant has violated TILA and caused widespread injuries should not be able to bring a class action. Denial of class action status would reward defendants who may have committed wrongs and leave victims who may have been wronged uncompensated. Note, *Class Actions Under the Truth in Lending Act,* 83 Yale L.J. 1416, 1435 (1974).

Andrews v. Chevy Chase Bank, FSB, 240 F.R.D. 612, 621-622 (E.D.Wis. 2007), appeal docketed, No. 07-1326 (7th Cir. Feb. 14, 2007).

As the *Andrews* Court recently observed, "TILA is a remedial statute, thus, consistent with its plain language, it must be construed liberally in favor of consumers. *Rossman v. Fleet Bank*, 280 F.3d 384, 390 (3d Cir.2002)." *Andrews, supra*, 240 F.R.D.

at 616. When TILA is construed to promote its remedial purpose, and the proper canons of statutory construction are applied to the *full* congressional history, the better construction is that advocated by Petitioners: a declaration of the right to rescind is available on a class-wide basis.

B. Decisions Precluding A Class-Wide Declaration Of The *Right* To Rescind Are Premised Upon Unjustified Fearmongering And Promote Anti-Consumer Practices.

In its Opinion, the *Laliberte* Court said that "a declaratory judgment authorizing all class members to rescind their loans could be 'catastrophic.'" *Laliberte*, *supra*, 147 Cal.App.4th at 11. This conclusion is incorrect.

Lenders will not lose their security prior to the restoration of their principal. In *Palmer v. Wilson*, 502 F.2d 860 (9th Cir. 1974), the Ninth Circuit held that when a Court is fashioning equitable Orders that include a decree of rescission, "the court may condition the granting of rescission on the debtor's compliance with the court's order to tender to the creditor the principal of the loan that the debtor has received." *Palmer*, *supra*, 502 F.2d at 862. Since *Palmer*, the Ninth Circuit has held that restoration of the principal to the lender is a prerequisite to rescission. "Indeed, in *LaGrone* [*v. Johnson* (9th Cir. 1976) 534 F.2d 1360] we held that rescission should be conditioned on repayment of the amounts

advanced by the lender." *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1171 (9th Cir. 2003). Because Congress amended TILA to permit Courts to alter the procedural provisions of TILA, (15 U.S.C. § 1635 (b)), Courts are empowered to modify the timing provisions related to a demand for rescission, alleviating the concern about a lender's loss of security for its principal.[3]

In falling prey to illusory concerns and applying incorrect canons of statutory construction, courts are diminishing the value to borrowers of recouping up to three years' of interest paid out on mortgages, which ultimately vitiates the purpose of TILA. A lender must comply with the letter as well as the spirit of TILA. *Handy v. Anchor Mortgage Corp.*, 464 F.3d 760, 764 (7th Cir. 2006). By presuming congressional intent where the evidence is lacking, and by accepting those decisions seeking to limit rescission to an individual remedy, the anti-rescission opinions inform lenders that they face no class-wide consequences, other than a capped, class-wide damage, for their failure to follow the strict requirements of TILA.

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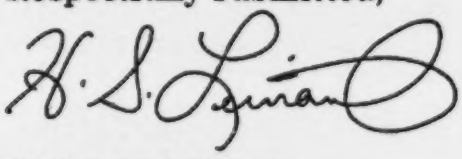
[3] The fact that Congress responded to *Palmer* and its progeny with a statutory amendment allowing Trial Courts to modify TILA's procedural provisions provides yet another example of why imputing Congressional intent to its inaction is both dangerous and unsupported. Clearly, Congress was aware of the issue addressed in *Palmer*. It then acted, and its intent was clear – Courts are empowered to protect lenders from a loss of their security interest when a rescission demand is tendered.

This Court should grant Appellants' Petition to eliminate the rift in TILA's interpretation and remind all courts that it is often folly to presume any particular legislative intent from inaction.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

APPENDIX A – OPINION OF THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION THREE, DATED AND FILED JANUARY 25, 2007

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

JAMES LALIBERTE et al.,	
Plaintiffs and Appellants,	G036235
v.	(Super. Ct. No. 03CC07092)
PACIFIC MERCANTILE BANK,	OPINION
Defendant and Respondent.	

Appeal from orders of the Superior Court of Orange County, David C. Velasquez, Judge. Reversed.

Arias, Ozzello & Gignac, H. Scott Leviant, Mike Arias, Mark A. Ozzello; Newmeyer & Dillion,

Shane E. Coons and Thomas F. Newmeyer for Plaintiffs and Appellants.

Sheppard, Mullin, Richter & Hampton, Alan H. Martin, Robert S. Beall, David Huebner and Jeffrey M. Blank for Defendant and Respondent.

* * *

Plaintiffs James LaLiberte and Jann and Dennis O'Connor appeal the trial court's orders sustaining demurrers to class allegations without leave to amend. Plaintiffs contend they should have been allowed to further amend their class definition or to conduct further discovery to identify an adequate class representative. Plaintiffs also contend the trial court erred in ruling that rescission is unavailable as a class remedy for violations of the Truth in Lending Act (TILA) (15 U.S.C. § 1601 et seq.)[1] and regulation Z, implementing TILA.

We agree the trial court erred in denying plaintiffs leave to amend the class definition in their third amended complaint, but conclude it correctly denied plaintiffs leave to amend the class action rescission claim in their second amended complaint.

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1 All statutory references are to title 15 United States Code, unless otherwise indicated.

I

FACTUAL AND PROCEDURAL BACKGROUND

In April 2002, plaintiffs applied to defendant Pacific Mercantile Bank (PMB) for refinance loans secured by their principal residences. In connection with the loan, PMB provided plaintiffs with a disclosure statement purporting to include the disclosures required by TILA. The statement, however, failed to disclose closing fees of $450 charged in each of the loans. Plaintiffs allege this omission violated TILA.

Plaintiffs filed suit against PMB on May 22, 2003. The initial complaint included only individual claims. On November 21, 2003, plaintiffs amended their complaint to include class allegations, listing two subclasses of persons who obtained certain PMB loans, and either failed to receive, or received inaccurate, TILA disclosures. One subclass included persons who obtained loans "during the period from May 22, 2002 to the present." The other subclass included persons who obtained loans "during the period from May 22, 2000 to the present."[2] The trial court sustained demurrers to the first amended complaint, concluding the class allegations failed to allege sufficient common facts to constitute a single

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2 Presumably, these dates were determined by the initial complaint's filing date and the one-year statute of limitations for seeking statutory damages under TILA (15 U.S.C. § 1640(e)), and the three-year limitation for rescission under TILA (15 U.S.C. § 1635(f)).

class.

Plaintiffs' second amended complaint alleged four subclasses, two including persons who obtained loans after May 22, 2000, and two including persons who obtained loans after May 22, 2002. PMB again demurred, and filed a motion to strike contending, inter alia, the statute of limitations ceased running on class claims not when the complaint was filed on May 22, 2003, but when plaintiffs first included a class claim in their first amended complaint on November 21, 2003. In opposition to the motion to strike, plaintiffs agreed to amend the class definitions to include only persons who obtained loans after November 21, 2002, for subclasses seeking damages, and after November 21, 2000, for subclasses seeking rescission.

The trial court sustained demurrers to the second amended complaint with leave to amend on class claims seeking statutory damages, but denied leave on class claims seeking rescission, concluding rescission was an individual remedy and therefore unavailable in a class action. The court explained that the class allegations in the second amended complaint were too generic, and that "plaintiff needs to identify the specific provisions of defendant's instruction manuals or policies which led to the violations of the TILA plaintiff has alleged."

Plaintiffs' third amended complaint eliminated subclasses, and defined the single class as follows: "'All persons who obtained a closed-end loan from Pacific Mercantile Bank primarily for personal,

family or household purposes secured by either real property or the borrower's principal dwelling during the period from November 21, 2002 to the present." The complaint alleges that PMB had provided neither the named plaintiffs nor the class members a disclosure statement reflecting the closing fee charged in connection with their loans. By amending the class definition to include only those persons who obtained loans after November 21, 2002, plaintiffs eliminated PMB's argument that some of the class claimants were time-barred. But PMB lodged a new objection to the amendment, arguing that the class representatives — who obtained their loans in April 2002 — were no longer members of the class.

The trial court granted PMB's demurrer to the class allegations of the third amended complaint without leave to amend on the sole ground that plaintiffs were not members of the class they purported to represent. The court's ruling did not affect plaintiffs' individual claims against PMB. Plaintiffs now appeal the trial court's order denying leave to amend the class claims in the third amended complaint, and its order sustaining demurrers to plaintiffs' class claims seeking rescission.

II

STANDARD OF REVIEW

An order sustaining demurrers to class action allegations "is appealable to the extent that it prevents further proceedings as a class action." (*Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th

952, 957, fn. 1.) In reviewing a trial court's order sustaining a demurrer, we exercise our independent judgment on whether a cause of action has been stated as a matter of law. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.) A trial court's denial of leave to amend, however, is reviewed for abuse of discretion. Plaintiffs bear the burden of proving the trial court abused its discretion and must demonstrate the proposed amendment states a cause of action. (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.)

III

DISCUSSION

A. *The Trial Court Abused Its Discretion in Denying Leave to Amend*

In sustaining demurrers to the third amended complaint without leave to amend, the trial court held: "Because the named Plaintiffs were never a member of the class they purport to represent, they have no standing to sue on its behalf. 'Where the complaint states a cause of action in someone, but not in the plaintiff, a general demurrer for failure to state a cause of action will be sustained.' (*Payne v. United California Bank* (1972) 23 Cal.App.3d 850 [*Payne*].) On the face of the complaint it is undisputed that plaintiffs were never members of the interested class. Thus, plaintiffs do not belong to the class whom they purportedly represent and cannot give themselves standing to sue by purporting to represent a class of which they [were] never a

member."

Plaintiffs contend the trial court's reliance on *Payne* was misplaced, and that *La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864 (*La Sala*) compels reversal. We agree.

In *La Sala,* the plaintiff borrowers brought a class action against a lender, alleging that the lender's trust deed form included a provision permitting acceleration if the borrower executed a junior encumbrance on the secured property. After the lender offered to waive the provision as to the named plaintiffs, the trial court dismissed the action, determining that the plaintiffs no longer represented the class because they had received full relief. The Supreme Court reversed, concluding that the plaintiffs should have been given the opportunity to add new class representatives by amendment, even though the lender's waiver removed plaintiffs from the class they purported to represent. (*La Sala, supra,* 5 Cal.3d at p. 868.)

La Sala then addressed the lender's arguments regarding alternative grounds for affirming the trial court's order. One of these arguments — virtually identical to PMB's contention — was that the plaintiffs were never members of the class defined in their complaint. The *La Sala* plaintiffs defined the class as those borrowing money from the lender "'during the four years immediately preceding the filing of this action.'" (*La Sala, supra,* 5 Cal.3d at p. 874.) Because the plaintiffs borrowed money six and 11 years before they filed the action,

the Supreme Court acknowledged the plaintiffs never qualified as class members. (*Ibid.*) The court nonetheless recognized that the named plaintiffs shared "'a well-defined "community of interest" in the questions of law and fact involved,'" because they were all persons against whom the lender had threatened to enforce its due-on-encumbrance clause. (*Id.* at p. 875.) The court viewed the time restriction in the complaint as arbitrary, and that the community of interest in the litigation's subject matter extended beyond any four-year period and "encompasses all borrowers, including plaintiffs, who have been threatened with acceleration under the due-on-encumbrance clause within the period of the statute of limitation." (*Ibid.*) The court concluded: "In sum, plaintiffs' nonmembership in the class defined by the complaint stems not from the lack of a community of interest between plaintiffs and the class, but from arbitrary and inadvertent limitation of the class. [Fn. omitted.]" (*Ibid.*) Because the plaintiffs could easily cure the pleading defect by amendment, the court held it would be an abuse of discretion to deny leave to amend. (*Id.* at p. 876.)

La Sala's reasoning applies here as well. In their third amended complaint, plaintiffs allege that they obtained their loans in April 2002, and defined the class members as those obtaining loans after November 21, 2002. The complaint, however, alleges PMB failed to disclose closing fees charged to both the named plaintiffs and the class members. Because dates on which they obtained their loans do not in any way affect the community of interest alleged between the named plaintiffs and class

members, it is of no significance.

In response to PMB's demurrer to the third amended complaint, plaintiffs asserted they could change the class definition to the following: "'James LaLiberte, and Dennis and Jann O'Connor, and all persons who obtained a closed-end loan from Pacific Mercantile Bank primarily for personal, family or household purposes secured by either real property or the borrower's principal dwelling during the period from November 21, 2002 to the present.'"[3] PMB decries this proposed amendment as advancing a "novel theory" which would allow someone having nothing in common with other class members to become a class representative by simply adding his or her name to the class definition. True, one may become a class member by adding his or her name to the class. Doing so, however, does not ipso facto make that person an adequate class representative. The named plaintiffs' adequacy as class representatives in the present case derives from the community of interest in the law and facts involved in the case, not merely because they add themselves to the class definition.

The trial court's reliance on *Payne* was misplaced. There, the plaintiffs sued a bank over its

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3 Alternatively, plaintiffs asked the trial court to allow them to take discovery to find a suitable class representative. Because we determine the plaintiffs' requested amendment will make them members of the class, we do not consider whether the trial court should have allowed discovery to ascertain other potential class representatives.

agreement with a vacuum cleaner company, Filter Queen, to finance consumers' purchase of vacuum cleaners. The plaintiffs alleged the bank, because of its financing agreement, participated in Filter Queen's fraudulent and unlawful business practices. The complaint alleged the plaintiffs purchased vacuum cleaners between April and June 1968. As plaintiffs discovered, however, the bank had not begun its financing arrangement with Filter Queen until November 1968. Thus, none of the named plaintiffs had a claim against the bank. *Payne* upheld the trial court's dismissal of the action, noting that the plaintiffs did not have standing to sue the bank because they never were members of the class they purported to represent and had failed to timely seek amendment to add a qualified class representative. (*Payne, supra,* 23 Cal.App.3d at pp. 852, 859.)

The present case is distinguishable from *Payne.* In *Payne,* the plaintiffs' purchase of their vacuum cleaners *before* the bank's involvement with Filter Queen demonstrated they could not pursue even an individual claim against the bank. Thus, regardless of how the class might be redefined, the plaintiffs could never demonstrate a community of interest with the other class members. Unlike *Payne,* the named plaintiffs in the present case have standing to bring individual claims mirroring those of the class members. Per *La Sala,* the fact that the named plaintiffs' claims arose earlier than those of the other class members is legally insignificant. Moreover, unlike the plaintiffs in *Payne,* the named plaintiffs here properly requested amendment in

their opposition to the demurrers.

We conclude the trial court abused its discretion in denying plaintiffs leave to amend their third amended complaint. Our decision addresses only the trial court's denial of leave to amend based on its reading of *Payne*. We recognize that PMB raised a number of other issues in its demurrers to the third amended complaint, and we express no opinion on their merit.

B. *Plaintiffs Cannot Assert Class Claims for Rescission*

In ruling on PMB's demurrers to plaintiffs' second amended complaint, the court held: "Plaintiffs are denied leave to amend to seek either rescission or a declaration of entitlement to rescission on the class claims. The court is persuaded by the rationale of the court in *Gibbons v. Interbank Funding Group* (N.D.Cal. 2002) 208 F.R.D. 278, 280-286, that neither form of relief is appropriate in a class action." Plaintiffs contend the trial court erred in denying leave to amend its class action rescission claim. We disagree.

No California state court has addressed the question whether a right to rescind under TILA applies on a class-wide basis, and the issue remains a matter of sharp debate among other courts.[4] The courts denying class wide rescission interpret section 1635 to provide a personal remedy. (See *Gibbons, supra,* 208 F.R.D. at p. 285.) Under that section, a party seeking to rescind must provide the lender with a notice of rescission. The lender then must, within 20 days, terminate its security interest in the debtor's property, and return to the rescinding party "any money or property given as earnest money, downpayment, or otherwise." Upon the lender's compliance, the rescinding party must tender to the lender any money or property received in the transaction.

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[4] Cases holding that rescission under TILA may not be pursued as a class action include: *James v. Home Const. Co. of Mobile, Inc.* (5th Cir. 1980) 621 F.2d 727, 730; *Gibbons v. Internbank Funding Group* (N.D.Cal. 2002) 208 F.R.D. 278, 285-286 (*Gibbons*); *Murry v. America's Mortgage Banc* (N.D.Ill. May 5, 2005, No. 03 C 5811) 2005 U.S. Dist. LEXIS 11751, 2005 WL 1323364 *10-11; *Jefferson v. Security Pacific Financial Services, Inc.* (N.D.Ill. 1995) 161 F.R.D. 63, 68-69 (*Jefferson*); *Mayo v. Sears, Roebuck & Co.* (S.D.Ohio 1993) 148 F.R.D. 576, 583. Cases allowing TILA rescission claims to be pursued as a class action include: *McKenna v. First Horizon Home Loan Corp.* (D.Mass., Nov. 10, 2005, Civ. A. No. 04-10370-RCL) 2005 U.S. Dist. LEXIS 41491 (*McKenna*); *Rodrigues v. Members Mortg. Co., Inc.* (D.Mass. 2005) 226 F.R.D. 147, 153; *Latham v. Residential Loan Ctrs. of America, Inc.* (N.D.Ill., May 6, 2004, No. 03 C 7094) 2004 U.S. Dist. LEXIS 7993, 2004 WL 1093315; *McIntosh v. Irwin Union Bank & Trust Co.* (D.Mass. 2003) 215 F.R.D. 26, 33; *Williams v. Empire Funding Corp.* (E.D.Pa. 1998)183 F.R.D. 428, 435-36.

Accordingly, "TILA contemplates that 'individuals must choose to assert the right to rescind, on an individual basis and within individual time frames, before filing suit.'" (*Gibbons, supra,* 208 F.R.D. at p. 285.) Here, plaintiffs do not assert that any of the class members served a notice of rescission, and it is doubtful that most of the class members would even desire this remedy. Thus, it is unclear whether an existing controversy actually would surface between the lender and class members. "Without any rescission requests, nor subsequent denials by defendants, it is not at all clear that a justiciable controversy exists between the class and defendants." (*Ibid.*; see also *Jefferson, supra,* 161 F.R.D. at p. 69.)

Courts allowing rescission class claims sidestep the notice issue by ruling that "the filing of the complaint constitutes statutory notice of rescission . . . ." (*Taylor v. Domestic Remodeling, Inc.* (5th Cir. 1996) 97 F.3d 96, 100; see also *McIntosh, supra,* 215 F.R.D. at p. 323.) To construe the mere filing of a class action complaint as a statutory notice of rescission, however, would trigger the lender's obligation to terminate its security interest in all of the class members' property, and could trigger the class members' obligation to tender the money or property received back to the lender. Unlike class actions seeking damages or an injunction, rescission under TILA creates obligations between both the lender and the borrower. We agree with those courts that hold rescission under TILA is a personal remedy not suitable for class action treatment.

Moreover, Congress has expressly provided for class actions under section 1640, governing statutory damages, and has never amended section 1635, governing rescission, to include any mention of class actions. In particular, section 1640 was amended in 1974 to cap damages recoverable in a class action. The provision currently provides that "the total recovery . . . in any class action or series of class actions arising out of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor[.]" (§ 1640(a)(2)(B).) The purpose of this limitation was "'to protect small business firms from catastrophic judgments.'" (H.R. Conf. Rep. No. 93-1429 (1974), quoted in *Johnson v. West Suburban Bank* (3d Cir. 2000) 225 F.3d 366, 372.) Although Congress initially enacted a $100,000 class action damages cap, it was raised two years later to $500,000, based on the following reasoning: "The recommended $500,000 limit, coupled with the 1% formula, provides, we believe, a workable structure for private enforcement. Small businesses are protected by the 1% measure, while a potential half million dollar recovery ought to act as a significant deterrent to even the largest creditor." (S. Rep. No. 94-590, at 8 (1976), quoted in *Johnson,* at p. 373.)

Plaintiffs assert we cannot infer congressional intent from its failure to include class action provisions in section 1635. They rely on *McKenna,* which noted: "This court does not find it significant that Congress expressly referred to class actions in connection with setting a damages cap, but did not make a comparable amendment to the rescission

statute. It is just as likely that Congress did not intend to in any way limit rescission claims which are designed to put the consumer back in the same position as before the inaccurate information was provided." (*McKenna, supra,* 2005 U.S. Dist. LEXIS 41491, *23-24.)

We disagree with *McKenna,* and find it difficult to believe that Congress would carefully balance the deterrent effect of class actions under TILA against the potential harm to businesses in the context of statutory damages, and yet allow class action rescission to proceed without any safeguard for the affected business. As noted above, a lender subject to rescission must, within 20 days of receiving a notice of rescission, terminate its security interest in the debtor's property. (§ 1635.) The lender must do so *before* the debtor must tender to the lender any money or property received in the transaction. (*Ibid.*) PMB's secured loan to the O'Connors alone was $375,919.92. Here, 100 class members seeking rescission would mean PMB could face the loss of over $37 million in security upon entry of an unfavorable declaratory judgment. In other words, a declaratory judgment authorizing all class members to rescind their loans could be "catastrophic."

This situation begs the question why Congress would cap recovery on class actions under section 1640, yet not do so for section 1635. The answer is found in the status of case law in 1974 and 1976, when the cap was enacted and increased. During this time period, numerous cases recognized that

class actions seeking damages under section 1640 were appropriate, but class actions seeking rescission were virtually nonexistent. (See *Nelson v. United Credit Plan, Inc.* (E.D.La. 1978) 77 F.R.D. 54.) In *Nelson,* the court made the following observation of the situation as it existed in 1978: "[We] note that there is not a single precedent in which class certification was broached, must less granted or denied, in a case where rescission pursuant to 15 U.S.C. § 1635 was the relief prayed for. While class actions are not discouraged under the Truth-in-Lending Act any more than in other contexts [fn. omitted] and it appears that Congress intended that some Truth-in-Lending violations would proceed as class actions, [fn. omitted] we have found no evidence of congressional intent that class treatment is appropriate in actions seeking rescission in the Truth-in-Lending context." (*Nelson,* at p. 58.) Footnotes omitted.) Thus, we believe Congress's failure to address class actions in section 1635 when it amended section 1640 did not demonstrate a desire that rescission class actions proceed without limitation, but reflected the fact that no one had sought to use a class action to obtain rescission.

We conclude the trial court did not err in denying plaintiffs leave to amend their class action rescission claim.

IV

DISPOSITION

The order denying plaintiffs leave to amend

the class definition in their third amended complaint is reversed. The order sustaining demurrers to plaintiffs' class action rescission claim in the second amended complaint is affirmed. In the interest of justice, each party shall bear its own costs of this appeal.

ARONSON, J.

WE CONCUR:

SILLS, P. J.

RYLAARSDAM, J.

APPENDIX B – ORDER OF THE CALIFORNIA SUPREME COURT DENYING PETITION FOR REVIEW, DATED AND FILED MAY 9, 2007

Court of Appeal, Fourth Appellate District, Div. 3 – No. G036235
S150839

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JAMES LALIBERTE et al., Plaintiffs and Appellants,

v.

PACIFIC MERCANTILE BANK, Defendant and Respondent.

Petition for review is denied.

GEORGE
Chief Justice

APPENDIX C – 15 U.S.C. § 1635

§ 1635. Right of rescission as to certain transactions

(a) Disclosure of obligor's right to rescind

Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under this subchapter, whichever is later, by notifying the creditor, in accordance with regulations of the Board, of his intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this section the rights of the obligor under this section. The creditor shall also provide, in accordance with regulations of the Board, appropriate forms for the obligor to exercise his right to rescind any transaction subject to this section.

(b) Return of money or property following rescission

When an obligor exercises his right to rescind under subsection (a) of this section, he is not liable for any finance or other charge, and any security interest given by the obligor, including any such interest arising by operation of law, becomes void upon such a rescission. Within 20 days after receipt of a notice of rescission, the creditor shall return to the obligor any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the obligor, the obligor may retain possession of it. Upon the performance of the creditor's obligations under this section, the obligor shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the obligor shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the obligor, at the option of the obligor. If the creditor does not take possession of the property within 20 days after tender by the obligor, ownership of the property vests in the obligor without obligation on his part to pay for it. The procedures prescribed by this subsection shall apply except when otherwise ordered by a court.

(c) Rebuttable presumption of delivery of required disclosures

Notwithstanding any rule of evidence, written acknowledgment of receipt of any disclosures required under this subchapter by a person to whom information, forms, and a statement is required to be given pursuant to this section does no more than create a rebuttable presumption of delivery thereof.

(d) Modification and waiver of rights

The Board may, if it finds that such action is necessary in order to permit homeowners to meet bona fide personal financial emergencies, prescribe regulations authorizing the modification or waiver of any rights created under this section to the extent and under the circumstances set forth in those regulations.

(e) Exempted transactions; reapplication of provisions

This section does not apply to –

(1) a residential mortgage transaction as defined in section 1602(w) of this title;

(2) a transaction which constitutes a refinancing or consolidation (with no new advances) of the principal

balance then due and any accrued and unpaid finance charges of an existing extension of credit by the same creditor secured by an interest in the same property;

(3) a transaction in which an agency of a State is the creditor; or

(4) advances under a preexisting open end credit plan if a security interest has already been retained or acquired and such advances are in accordance with a previously established credit limit for such plan.

(f) Time limit for exercise of right

An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon the sale of the property, whichever occurs first, notwithstanding the fact that the information and forms required under this section or any other disclosures required under this part have not been delivered to the obligor, except that if (1) any agency empowered to enforce the provisions of this subchapter institutes a proceeding to enforce the provisions of this section within three years after the date of consummation of the transaction, (2) such agency finds a violation of this section, and (3) the obligor's right to rescind is based in whole or in part on any matter involved in such proceeding, then the obligor's right of rescission shall expire three years after the date of consummation of

the transaction or upon the earlier sale of the property, or upon the expiration of one year following the conclusion of the proceeding, or any judicial review or period for judicial review thereof, whichever is later.

(g) Additional relief

In any action in which it is determined that a creditor has violated this section, in addition to rescission the court may award relief under section 1640 of this title for violations of this subchapter not relating to the right to rescind.

(h) Limitation on rescission

An obligor shall have no rescission rights arising solely from the form of written notice used by the creditor to inform the obligor of the rights of the obligor under this section, if the creditor provided the obligor the appropriate form of written notice published and adopted by the Board, or a comparable written notice of the rights of the obligor, that was properly completed by the creditor, and otherwise complied with all other requirements of this section regarding notice.

(i) Rescission rights in foreclosure

(1) In general

Notwithstanding section 1649 of this title, and subject to the time period provided in subsection (f) of this section, in addition to any other right of rescission available under this section for a transaction, after the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor shall have a right to rescind the transaction equivalent to other rescission rights provided by this section, if--

(A) a mortgage broker fee is not included in the finance charge in accordance with the laws and regulations in effect at the time the consumer credit transaction was consummated; or

(B) the form of notice of rescission for the transaction is not the appropriate form of written notice published and adopted by the Board or a comparable written notice, and otherwise complied with all the requirements of this section regarding notice.

(2) Tolerance for disclosures

Notwithstanding section 1605(f) of this title, and subject to the time period provided in subsection (f) of this section, for the purposes of exercising any rescission rights after the initiation of any judicial or nonjudicial foreclosure process on the principal dwelling of the obligor securing an extension of

credit, the disclosure of the finance charge and other disclosures affected by any finance charge shall be treated as being accurate for purposes of this section if the amount disclosed as the finance charge does not vary from the actual finance charge by more than $35 or is greater than the amount required to be disclosed under this subchapter.

(3) Right of recoupment under State law

Nothing in this subsection affects a consumer's right of rescission in recoupment under State law.

(4) Applicability

This subsection shall apply to all consumer credit transactions in existence or consummated on or after September 30, 1995.

APPENDIX D – 15 U.S.C. § 1640

§ 1640. Civil liability

(a) Individual or class action for damages; amount of award; factors determining amount of award

Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part, including any requirement under section 1635 of this title, or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of--

(1) any actual damage sustained by such person as a result of the failure;

(2)(A) (i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, (ii) in the case of an individual action relating to a consumer lease under part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000, or (iii) in the case of an individual action relating to a credit transaction not under an open end credit plan that is secured by real property or a dwelling, not less than $200 or greater than $2,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery under this subparagraph in any class action or series of class actions arising out

of the same failure to comply by the same creditor shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor;

(3) in the case of any successful action to enforce the foregoing liability or in any action in which a person is determined to have a right of rescission under section 1635 of this title, the costs of the action, together with a reasonable attorney's fee as determined by the court; and

(4) in the case of a failure to comply with any requirement under section 1639 of this title, an amount equal to the sum of all finance charges and fees paid by the consumer, unless the creditor demonstrates that the failure to comply is not material.

In determining the amount of award in any class action, the court shall consider, among other relevant factors, the amount of any actual damages awarded, the frequency and persistence of failures of compliance by the creditor, the resources of the creditor, the number of persons adversely affected, and the extent to which the creditor's failure of compliance was intentional. In connection with the disclosures referred to in subsections (a) and (b) of section 1637 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title, section 1637(a) of this title, or of paragraph (4), (5), (6), (7), (8), (9), or (10) of section 1637(b) of this title or for failing to comply with disclosure requirements under State law for any

term or item which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms or items referred to in section 1637(a) of this title or any of those paragraphs of section 1637(b) of this title. In connection with the disclosures referred to in subsection (c) or (d) of section 1637 of this title, a card issuer shall have a liability under this section only to a cardholder who pays a fee described in section 1637(c)(1)(A)(ii)(I) or section 1637(c)(4)(A)(i) of this title or who uses the credit card or charge card. In connection with the disclosures referred to in section 1638 of this title, a creditor shall have a liability determined under paragraph (2) only for failing to comply with the requirements of section 1635 of this title or of paragraph (2) (insofar as it requires a disclosure of the "amount financed"), (3), (4), (5), (6), or (9) of section 1638(a) of this title, or for failing to comply with disclosure requirements under State law for any term which the Board has determined to be substantially the same in meaning under section 1610(a)(2) of this title as any of the terms referred to in any of those paragraphs of section 1638(a) of this title. With respect to any failure to make disclosures required under this part or part D or E of this subchapter, liability shall be imposed only upon the creditor required to make disclosure, except as provided in section 1641 of this title.

(b) Correction of errors

A creditor or assignee has no liability under this section or section 1607 of this title or section 1611 of this title for any failure to comply with any requirement imposed under this part or part E of this subchapter, if within sixty days after discovering an error, whether pursuant to a final written examination report or notice issued under section 1607(e)(1) of this title or through the creditor's or assignee's own procedures, and prior to the institution of an action under this section or the receipt of written notice of the error from the obligor, the creditor or assignee notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to assure that the person will not be required to pay an amount in excess of the charge actually disclosed, or the dollar equivalent of the annual percentage rate actually disclosed, whichever is lower.

(c) Unintentional violations; bona fide errors

A creditor or assignee may not be held liable in any action brought under this section or section 1635 of this title for a violation of this subchapter if the creditor or assignee shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error. Examples of a bona fide error include, but are not limited to, clerical, calculation,

computer malfunction and programing, and printing errors, except that an error of legal judgment with respect to a person's obligations under this subchapter is not a bona fide error.

(d) Liability in transaction or lease involving multiple obligors

When there are multiple obligors in a consumer credit transaction or consumer lease, there shall be no more than one recovery of damages under subsection (a)(2) of this section for a violation of this subchapter.

(e) Jurisdiction of courts; limitations on actions; State attorney general enforcement

Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law. An action to enforce a violation of section 1639 of this title may also be brought by the appropriate State attorney general in any appropriate United States district

court, or any other court of competent jurisdiction, not later than 3 years after the date on which the violation occurs. The State attorney general shall provide prior written notice of any such civil action to the Federal agency responsible for enforcement under section 1607 of this title and shall provide the agency with a copy of the complaint. If prior notice is not feasible, the State attorney general shall provide notice to such agency immediately upon instituting the action. The Federal agency may--

(1) intervene in the action;

(2) upon intervening--

(A) remove the action to the appropriate United States district court, if it was not originally brought there; and

(B) be heard on all matters arising in the action; and

(3) file a petition for appeal.

(f) Good faith compliance with rule, regulation, or interpretation of Board or with interpretation or approval of duly authorized official or employee of Federal Reserve System

No provision of this section, section 1607(b) of this title, section 1607(c) of this title, section 1607(e) of this title, or section 1611 of this title imposing any liability shall apply to any act done or omitted in

good faith in conformity with any rule, regulation, or interpretation thereof by the Board or in conformity with any interpretation or approval by an official or employee of the Federal Reserve System duly authorized by the Board to issue such interpretations or approvals under such procedures as the Board may prescribe therefor, notwithstanding that after such act or omission has occurred, such rule, regulation, interpretation, or approval is amended, rescinded, or determined by judicial or other authority to be invalid for any reason.

(g) Recovery for multiple failures to disclose

The multiple failure to disclose to any person any information required under this part or part D or E of this subchapter to be disclosed in connection with a single account under an open end consumer credit plan, other single consumer credit sale, consumer loan, consumer lease, or other extension of consumer credit, shall entitle the person to a single recovery under this section but continued failure to disclose after a recovery has been granted shall give rise to rights to additional recoveries. This subsection does not bar any remedy permitted by section 1635 of this title.

(h) Offset from amount owed to creditor or assignee; rights of defaulting consumer

A person may not take any action to offset any amount for which a creditor or assignee is potentially liable to such person under subsection (a)(2) of this section against any amount owed by such person, unless the amount of the creditor's or assignee's liability under this subchapter has been determined by judgment of a court of competent jurisdiction in an action of which such person was a party. This subsection does not bar a consumer then in default on the obligation from asserting a violation of this subchapter as an original action, or as a defense or counterclaim to an action to collect amounts owed by the consumer brought by a person liable under this subchapter.

(i) Class action moratorium

(1) In general

During the period beginning on May 18, 1995, and ending on October 1, 1995, no court may enter any order certifying any class in any action under this subchapter--

(A) which is brought in connection with any credit transaction not under an open end credit plan which is secured by a first lien on real property or a dwelling and constitutes a refinancing or consolidation of an existing extension of credit; and

(B) which is based on the alleged failure of a creditor--

(i) to include a charge actually incurred (in connection with the transaction) in the finance charge disclosed pursuant to section 1638 of this title;

(ii) to properly make any other disclosure required under section 1638 of this title as a result of the failure described in clause (i); or

(iii) to provide proper notice of rescission rights under section 1635(a) of this title due to the selection by the creditor of the incorrect form from among the model forms prescribed by the Board or from among forms based on such model forms.

(2) Exceptions for certain alleged violations

Paragraph (1) shall not apply with respect to any action--

(A) described in clause (i) or (ii) of paragraph (1)(B), if the amount disclosed as the finance charge results in an annual percentage rate that exceeds the tolerance provided in section 1606(c) of this title; or

(B) described in paragraph (1)(B)(iii), if--

(i) no notice relating to rescission rights under section 1635(a) of this title was provided in any form; or

(ii) proper notice was not provided for any reason other than the reason described in such paragraph.